

1 Traeger Machetanz, Esq.
2 OLES MORRISON RINKER & BAKER, LLP
3 745 Fourth Avenue, Suite 502
4 Anchorage, AK 99501-2136
5 Telephone: (907) 258-0106
6 Telecopier: (907) 258-5519

7 Attorneys for Nugget Construction Co.,
8 Inc., and USF&G, Defendants

9 IN THE UNITED STATES DISTRICT COURT
10 FOR THE DISTRICT OF ALASKA AT ANCHORAGE

11 UNITED STATES OF AMERICA for the)
12 use of NORTH STAR TERMINAL &)
13 STEVEDORE COMPANY, d/b/a NORTHERN)
14 STEVEDORING & HANDLING, and NORTH)
15 STAR TERMINAL & STEVEDORE COMPANY,)
16 d/b/a Northern Stevedoring &)
17 Handling, on its own behalf,)

No. A98-009 CIV (HRH)

18 Plaintiffs,)

19 and)

20 UNITED STATES OF AMERICA for the)
21 use of SHORESIDE PETROLEUM, INC.,)
22 d/b/a Marathon Fuel Service, and)
23 SHORESIDE PETROLEUM, INC., d/b/a)
24 Marathon Fuel Service, on its own)
25 behalf,)

Intervening Plaintiffs,)

and)

METCO, INC.,)

Intervening Plaintiff,)

vs.)

21 NUGGET CONSTRUCTION, INC.; SPENCER)
22 ROCK PRODUCTS, INC.; UNITED)
23 STATES FIDELITY AND GUARANTY)
24 COMPANY; and ROBERT A. LAPORE,)
25

Defendants.)

AFFIDAVIT OF
L.D. "RANDY" RANDOLPH
IN SUPPORT OF NUGGET'S
MOTION FOR SUMMARY JUDGMENT
ON METCO'S STATE LAW CLAIMS

1 STATE OF ALASKA)

2)

3)

4
5 L.D. "Randy" RANDOLPH, being first duly sworn upon oath, deposes
6 and states as follows:

7 1. I am the owner of LDR Engineering Services, Inc. LDR
8 was hired by Nugget Construction, Inc. to perform Project Management
9 services for Nugget on the Homer Spit repair and extension project.
10 During all times relevant to the events at issue in the present
11 litigation, I acted in that capacity on behalf of Nugget. I am over
12 the age of eighteen and am competent to testify in this matter.

13 2. On or about September 28, 1996, the U.S. Corps of
14 Engineers ("USCOE") awarded Nugget Contract DACW85-96-C-0020 to repair
15 and extend the Homer Spit in Seward, Alaska (the "Project"). Attached
16 hereto as Exhibit 1 is a true and correct copy of Contract No. DACW85-
17 96-C-0020. USF&G provided a payment bond on the Project. Attached
18 hereto as Exhibit 2 is a true and correct copy of Payment Bond 99-
19 0120-50298-96-5.

20 3. On January 15, 1997, Nugget entered into a Material
21 Contract with Spencer Rock for the supply and transport of armor, toe
22 and filter stone rock from the Spencer Quarry, located in Seward,
23 Alaska, to a barge docked in Seward. Attached hereto as Exhibit 3 is
24 a true and correct copy of the Material Contract, December 18, 1996.
25 Between the Spencer Quarry and the Seward dock, the rock traveled in

U.S. ex rel. North Star, et al. v. Nugget Construction, et al.
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Affidavit of L.D. "Randy" Randolph -- Page 2 of 7

1 four distinct segments. First, after blasting, rocks were gathered
2 and loaded into trucks at the Spencer Quarry. These trucks
3 transported the rock from the Spencer Quarry to the Alaska Railroad
4 Corporation ("ARRC") station, where the rock was loaded into ARRC rail
5 cars. This work was performed by Spencer Rock. Second, the rock
6 traveled by ARRC rail car to Seward, where it was unloaded from the
7 rail cars onto a "siding" at the ARRC rail yard in Seward. Third, the
8 rock was transported by truck from the siding at the ARRC rail yard in
9 Seward to the Seward dock. This is the segment in which Metco
10 performed its work. Fourth, and finally, the rock was loaded by North
11 Star into "skip boxes" and from the boxes at the Seward dock onto
12 barges, which carried the rock to the Homer Spit.

13 4. Spencer Rock commenced performance on or about January
14 15, 1997. In April 1997, Nugget became concerned that Spencer Rock
15 was not producing enough quantities of conforming rock for the
16 Project. First, Nugget visited the Spencer Quarry and found large
17 stockpiles of nonconforming rock. Second, Spencer Rock's major pieces
18 of equipment for operating the Spencer Quarry had been repossessed by
19 Spencer Rock's bank. In light of these developments, in early April
20 1997, Spencer Rock approached Nugget for assistance in carrying out
21 Spencer Rock's duties under the Material Contract. Spencer Rock and
22 Nugget subsequently executed a Support Agreement on April 23, 1997.
23 Attached hereto as Exhibit 4 is a true and correct copy of the Support
24 Agreement, April 23, 1997. Per this agreement, the parties agreed
25 that, in exchange for Nugget's support of Spencer Rock's work under

1 the Material Contract, Nugget would recover from Spencer Rock, or
2 "backcharge," the amounts owed to Nugget by Spencer Rock per the
3 Material Contract.

4 5. Nugget entered into the Support Agreement with Spencer
5 Rock to ensure that its performance on its contract with the Federal
6 Government would not suffer from anticipated difficulties in Spencer
7 Rock's performance of its contract with Nugget. There was no other
8 purpose. The Support Agreement thus memorialized an arrangement
9 between Nugget and Spencer Rock in which the parties in effect agreed
10 to modify the Material Contract such that Nugget would be fairly
11 compensated for its assistance to Metco, nothing more.

12 6. Nugget's support efforts to Spencer Rock were provided
13 exclusively to Spencer Rock. Nugget never offered or provided its
14 support services to Metco, Shoreside or North Star.

15 7. During the third segment of work (transport of rock
16 from the railcar to the dockside), Nugget never provided support
17 services, in the way of manpower, equipment, trucks, loaders,
18 direction or otherwise, to Metco. Further, Nugget's support services
19 never extended to the fourth segment, which involved the loading of
20 rocks from the skip boxes onto the barges. Although I was present to
21 facilitate loading of rock from the skip boxes to the barges, this
22 would have occurred in the normal course even if the Support Agreement
23 had never been executed. Metco never sought Nugget's guidance,
24 direction or assistance during the course of Metco's performance.

1 8. The total amount of rock that Spencer Rock was
2 contractually obligated to transport, and that was in fact transported
3 with Nugget's assistance, from the Spencer Quarry to the Nugget barges
4 in Seward was equal to ten barge loads.

5 9. On May 8, 1997 Nugget paid Spencer Rock \$147,184.66
6 the first two barge loads of rock and, between May 8, 1997 and August
7 8, 1997, Nugget paid Spencer Rock an additional \$50,000, totaling
8 \$197,184.66.

9 10. Based on the total quantity of rock delivered for the
10 project at the rates and terms set forth in the Material Contract, the
11 total value of rock produced by Spencer Rock was \$1,623,892.50.
12 Nugget's costs associated with rendering assistance to Spencer Rock
13 pursuant to the Support Agreement were \$1,878,138. In addition, as a
14 direct result of Spencer Rock's failure to provide rock that conformed
15 to the Material Contract, Nugget incurred additional expenses in
16 excess of \$1,213,380. Thus, the total amount of costs and expenses
17 that Nugget incurred resulting from its dealings with Spencer Rock
18 exceeded the amount that Nugget agreed to pay Spencer Rock under the
19 Material Contract by \$1,664,811.

20 11. During the course of Metco's performance, I had a
21 conversation with Frank Dieckgraeff, most likely at the Seward dock,
22 during which I urged Metco to support Spencer Rock during the course
23 of performance on the project. With the exception of this one
24 conversation, there were no other communications, verbal, written,
25

1 express, implied or otherwise, between any representative of Nugget
2 and any representative of Metco during the course of Metco's
3 performance on the Project.

4 12. Nugget never made any oral or written promise to be
5 contractually bound to Metco. Moreover, Nugget never exhibited any
6 conduct to manifest the intent to be contractually bound to Metco.

7 13. Neither I nor anyone at Nugget ever indicated to Metco
8 that Nugget would cover Spencer Rock's outstanding debts to Metco.

9 14. There was never any express agreement between Nugget
10 and Mr. LaPore that Mr. LaPore or Spencer Rock would act as Nugget's
11 agent in the prosecution of Spencer Rock's work under the Material
12 Contract. Further, there was never a manifestation on the part of
13 Nugget that Spencer Rock may act on Nugget's account.

14 15. Nugget's payments for work under the Material
15 Contract, which included the work that Metco performed for Spencer
16 Rock, were made exclusively to Spencer Rock and never to Metco.

17 FURTHER your affiant saith not.

18 L.D. Randolph
19 L.D. RANDOLPH

20 SUBSCRIBED AND SWORN to before me this 20th day of April, 2006
21 2006.



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Teresa R. Foehnerle
Printed Name: Teresa R. Foehnerle
NOTARY PUBLIC in and for the State
of Alaska, residing at Wasilla
My Appointment Expires March 10, 2009

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P JAD Randolph Affidavit Metco MSJ State Law 99310.0002

OLE MORRISON RINKER & BAKER LLP
745 West Fourth Avenue, Suite 502
Anchorage, Alaska 99501-2136
Tel: (907) 258-0106 Fax: (907) 258-5519